ARUMUGAM MUTHUSAMY *a*

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR *b*
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CRIMINAL APPEAL NO: 06-1-93]
4 MARCH 1998

c

CRIMINAL PROCEDURE: *Conviction - Whether there was sufficient basis for conviction - Accused identified by way of dock identification - Whether constituted good identification evidence - Absence of identification parade - Whether fatal - Whether trial vitiated by miscarriage of justice*

d

EVIDENCE: *Identification evidence - Dock identification of accused - Whether constituted good identification evidence - Whether there was sufficient basis for conviction - Whether trial magistrate failed to direct herself on visual evidence of identification in accordance with guidelines in R v. Turnbull*

e

Before the trial magistrate, the applicant was convicted for the theft of a motorcar and was sentenced to 14 months' imprisonment. The facts showed that in convicting the applicant the trial magistrate had relied *inter alia* on the evidence of PW1 and PW2, who identified the applicant from the dock. It was the magistrate's view that, the absence of an identification parade irrespective, the dock identification of the applicant provided good and *f* sufficient identification evidence for her to rely upon. The applicant alleged that the magistrate, in so relying upon the dock identification evidence, had not warned herself as to convicting the applicant on uncorroborated evidence of identity, and as such, his trial herein, upon the guidelines in *R v. Turnbull*, was vitiated by a clear miscarriage of justice. Following the affirmation by *g* the High Court of the trial magistrate's finding and conviction, the applicant referred for the consideration of the Federal Court the following questions of law, ie: (i) whether dock identification in court after a long lapse of time without holding an identification parade can be a sufficient basis for a conviction; and (ii) whether in a case dependent solely on dock identification, *h* the failure by a magistrate to direct himself with regard to the visual evidence of identification, in accordance with the established guidelines in *R v. Turnbull* resulting in a conviction based on uncorroborated evidence of identity being quashed would constitute a substantial miscarriage of justice.

i

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak):

[1] Question (i) was framed in general terms and lacked precise or essential facts necessary for a definite answer of "Yes" or "No". Facts such as how long was the "long lapse", and as to the circumstances in which the witness had seen the accused etc were lacking. These were essential for the purpose of arriving at a more definite answer to the question.

[1a] The term "dock identification" must be taken to mean the identification of an accused for the first time in court at trial. In that context, a dock identification is undesirable, and it will be a good practice to hold an identification parade. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction will be too stringent. Briefly, therefore, the answer to question (i) is: it depends on the particular facts and circumstances of each case.

[2] Bearing in mind the words used in question (ii), the question posed was whether the question of such a conviction as highlighted in that question would constitute a substantial miscarriage of justice. On the question as framed, the answer was clearly in the negative.

[3] The facts and circumstances in this case were different from those in *R v. Turnbull.* In this case there were two identification witnesses. In point of law, an identification by one witness can constitute support for the identification by another provided that the trial magistrate warns himself that even a number of honest witnesses can all be mistaken.

[3a] It was not right to say that the trial magistrate had totally failed to comply with the guidelines in *R v. Turnbull.* The trial magistrate did examine the circumstances in which PW1 and PW2 identified the applicant on 1 or 2 April 1986. Her only failure, as contended by the applicant, was on the administration of a caution to herself. But though the magistrate did not warn herself in terms postulated in *R v. Turnbull*, the facts showed that she was mindful of the fact that PW1 and PW2 had never seen the accused prior to the incident on 1 or 2 April 1986. These apart, the quality of the identification evidence was good and was thus accepted by the magistrate. Further, other implicating evidence were also before her, and on top of that, the defence, which the trial magistrate rejected, was only one of complete denial.

[4] It would have been prudent to hold an identification parade. However, having regard to the cumulative effect of the evidence as a whole, particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting *inter alia* the recovery of the car-key from the applicant, the use of the car by the applicant, the removal of the car from the front of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, there was no failure of justice occasioned nor was there any ground for contending that the conviction was unsatisfactory or unsafe. The concurrent findings of the trial magistrate and the High Court must therefore not be disturbed.

[Conviction and sentence affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di hadapan majisteret perbicaraan, pemohon kelihatannya telah disabit atas kesalahan mencuri motokar dan telah dihukum 14 bulan penjara. Fakta menunjukkan bahawa semasa mensabit pemohon majisteret perbicaraan bergantung antaranya kepada keterangan SP1 dan SP2, yang mengecam pemohon ketika di kandang. Ianya merupakan pendapat majisteret yang bijaksana bahawa, walaupun perbarisan cam tidak diadakan, identifikasi pemohon dari kandang tersebut adalah keterangan cam yang baik dan mencukupi untuk beliau bergantung kepadanya. Pemohon berkata bahawa majisteret yang bijaksana, dalam bergantung kepada keterangan cam dari kandang tersebut, tidak memberi amaran kepada dirinya berhubung membuat sabitan berdasarkan keterangan identiti yang tidak disokong, dan dengan itu, perbicaraannya di sini, mengambilkira garispandu dalam *R v. Turnbull*, telah dicemari oleh salah laksana keadilan yang nyata. Dalam halkeadaan sedemikian, berikut pengesahan oleh Mahkamah Tinggi akan keputusan dan sabitan oleh majisteret perbicaraan, pemohon merujuk untuk pertimbangan Mahkamah Persekutuan soalan undang-undang berikut: (i) Samada identifikasi di kandang dalam mahkamah selepas suatu tempoh masa yang panjang tanpa mengadakan perbarisan cam boleh menjadi asas yang mencukupi untuk sabitan; (ii) Samada dalam satu kes yang bergantung semata-mata kepada identifikasi di kandang kegagalan majisteret mengarahkan dirinya berhubung keterangan identifikasi visual selaras dengan garispandu dalam *R v. Turnbull* [1976] 3 All ER 549 yang mana mengakibatkan sabitan berdasarkan keterangan identiti yang tidak disokong dibatalkan merupakan suatu salah laksana keadilan.

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Soalan (i) dirangka dalam bentuk yang umum serta ketandusan fakta-fakta penting atau tepat bagi memboleh suatu jawapan khusus "Ya" atau "Tidak" diberi. Tidak terdapat fakta-fakta tentang lama manakah "tempoh masa yang panjang", dan juga tentang hal-hal keadaan dalam mana seseorang saksi melihat tertuduh dll. walaupun fakta-fakta tersebut adalah penting bagi mencapai suatu jawapan yang lebih muktamad kepada soalan.

[1a] Ungkapan "dock identification" mestilah dilihat sebagai bermaksud identifikasi seorang tertuduh buat pertama kali di dalam mahkamah semasa perbicaraan. Dalam konteks tersebut, "dock identification" adalah tidak digalakkan, dan adalah satu amalan yang baik untuk mengadakan perbarisan cam. Tetapi untuk mengatakan bahawa perbarisan cam, dalam semua keadaan, mesti dibuat untuk dapat mempertahankan sesuatu sabitan adalah terlalu keras. Oleh itu, secara ringkasnya, jawapan kepada soalan (i) ialah: ianya bergantung kepada fakta-fakta dan keadaan khusus sesuatu kes.

[2] Mengambilkira perkataan yang digunakan dalam soalan (ii), soalan yang dikemukakan adalah samada suatu sabitan sepertimana yang ditonjolkan dalam soalan tersebut merupakan suatu salah laksana keadilan. Berdasarkan kepada soalan sebagaimana ianya dirangka, jawapannya jelas dalam bentuk negatif.

[3] Fakta dan keadaan di sini adalah berbeza dari yang wujud dalam *R v. Turnbull*. Dalam kes semasa, terdapat dua orang saksi cam. Sebagai satu perkara undang-undang, pengecaman atau identifikasi yang dibuat oleh seorang saksi akan menjadi penyokong kepada pengecaman atau identifikasi yang dibuat oleh seorang yang lain sekiranya majisteret perbicaraan memberi amaran terhadap dirinya bahawa segolongan saksi-saksi yang jujur, kesemua mereka masih mungkin melakukan kesilapan.

[3a] Adalah tidak benar untuk mengatakan bahawa majisteret perbicaraan telah gagal sepenuhnya untuk mematuhi garispandu dalam *R v. Turnbull*. Kenyataannya ialah, majisteret perbicaraan di sini telah memeriksa suasana bagaimana SP1 dan SP2 mengecam pemohon pada 1 atau 2 April 1986. Cumanya, sebagaimana yang dikatakan oleh pemohon, majisteret perbicaraan gagal memberi amaran akan dirinya. Tetapi, walaupun majisteret tidak memberi amaran akan dirinya secara yang dibuat dalam *R v. Turnbull*, fakta menunjukkan beliau sedar tentang fakta bahawa SP1 dan SP2 tidak pernah melihat tertuduh sebelum peristiwa

1 atau 2 April 1986. Selain itu, mutu keterangan cam adalah baik dan diterima oleh majisteret yang bijaksana. Juga, lain-lain bukti yang menunjukkan keterlibatan berada di hadapan beliau, dan akhir sekali, pembelaan yang dikemukakan, yang ditolak oleh majisteret, hanyalah semata-mata satu penafian.

[4] Adalah berhemat untuk mengadakan perbarisan cam. Bagaimanapun, mengambilkira kesan kumulatif keterangan keseluruhannya, khasnya keterangan SP1 dan SP2 yang diterima oleh kedua-dua mahkamah di bawah, keterangan menyokong antara lainnya tentang penemuan kuncikereta dari pemohon, penggunaan kereta oleh pemohon, pengalihan kereta daripada depan kedai di mana pemohon tinggal, dan juga pendirian pemohon dalam pembelaannya, yang merupakan satu penafian semata-mata, maka tiada apa-apa salah laksana keadilan telah berlaku dan juga tiada alasan untuk mengatakan bahawa sabitan di sini adalah tidak memuaskan ataupun tidak selamat. Dapatan bersama Mahkamah Majisteret dan Mahkamah Tinggi tidak harus diganggu.

[Sabitan dan hukuman disahkan.]

Case referred to:
R v. Turnbull [1976] 3 All ER 549 ***(dist)***

For the applicant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Stanley C Augustin; Attorney General's Chambers

[Appeal from High Court, Melaka; Criminal Trial No: 51-31-88]

Reported by WA Sharif

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

Two questions were raised in this reference:

(1) Whether dock identification in court after a long lapse of time without holding an identification parade can be a sufficient basis for a conviction; and

(2) Whether in a case dependent **solely** on dock identification the failure by a magistrate to direct himself with regard to the visual evidence of identification in accordance with the established guidelines in *R v. Turnbull* [1976] 3 All ER 549 resulting in a conviction based on uncorroborated evidence of identity **being quashed** would constitute a substantial miscarriage of justice (bold added, save for the one under the case cited).

Question (1)

By the term "dock identification" we take it to mean identification of an accused for the first time in court at trial. And we shall attempt to answer the question posed with that meaning of the term in mind.

The question, as framed, is in general terms and lacks precise or essential facts necessary for a definite answer of "Yes" or "No". Much depends on the precise circumstances and the stance of the defence. How long is the "long lapse"? What are the circumstances in which a witness has seen the accused eg, the distance between him and the accused, the weather condition, any lighting particularly if at night, and, if so, quality of the lighting, the length of time the witness sees or observes the accused, any conversation carried on between them, whether the witness has known or seen the accused prior to the incident, and so forth. Facts such as those mentioned above are lacking, but they are essential for the purpose of arriving at a more definite answer to the above question referred.

Generally speaking, however, a dock identification in the sense as described above ie, identification of an accused for the first time in Court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

Briefly, therefore, the answer to Question (1) is: it depends on the particular facts and circumstances of each case.

Question (2)

As regards Question (2), it is important to note the following words used therein:

> Whether ... resulting in a conviction ... being quashed ... would constitute a substantial miscarriage of justice.

In other words, the question is whether the question of such a conviction would constitute a substantial miscarriage of justice.

On the question as framed, the answer, in our opinion, is clearly in the negative.

We have considered the guidelines in *R v. Turnbull* [1976] 3 All ER 549 CA. We do not propose to reproduce them save pointing out that they may be found from pp. 551 i to 552 j and from p. 553 b to j in the above report. Of course, the guidelines in *R v. Turnbull, supra,* deal with directions to juries. In a summary trial, the trial magistrate assumes the functions of the judge and the jury.

In the instant case under reference, the facts and circumstances are different. In this case there were two identification witnesses, PW1 and PW2. In point of law, an identification by one witness can constitute support for the identification by another provided that the trial magistrate warns himself that even a number of honest witnesses can all be mistaken. In our present case, though the trial magistrate did not warn herself in like terms, she was mindful of the fact that PW1 and PW2 had never seen the accused prior to the incident on 1 or 2 April 1986. The quality of the identification evidence was good. In the circumstances as shown by the evidence, she found it reasonable that they could remember the accused's face, and she accepted their evidence. Furthermore, there are other evidence: the car-key in the applicant's possession at the time of his arrest; both PW4 and PW5, who effected the arrest, said they used to see the applicant driving the car; and the car was parked in front of the shop where the applicant lived. Both PW4 and PW5 were not cross-examined.

The defence of the applicant, on the other hand, is one of complete denial. He denied taking the car from the complainant's house on 1 or 2 April 1986. Apart from admitting being arrested by the police on 17 May 1986 at about 11am, he denied handing the car-key to the police. He denied driving the car. He even denied that the police had on 17 May 1986 recovered the car from him or from the front of the shop No. 10 Market Street, Gopeng, where he then lived. His story was rejected by the trial magistrate who also noted that no notice of alibi was given to the prosecution as required under the Criminal Procedure Code. It is true that the evidence of what had happened in or near shop No. 10, even if believed, in itself and without more, could not go to prove the act of stealing. But it must be remembered that the central issue was one of identification, ie, whether the applicant was at the complainant's house in the night of 1 April 1986 or early morning of 2 April 1986. In this regard, the trial magistrate was entitled to consider all the evidence adduced in the case as a whole. What the applicant had stated in Court when tested against the testimonies of PW1, PW2, PW4 and PW5 goes to question of credibility. As it turned out, the trial magistrate believed the evidence of PW1 and PW2.

As regards the guidelines in *R v. Turnbull, supra,* it would not be right to say that the trial magistrate had **totally failed** to comply with them. Indeed, in fairness to Mr. Karpal Singh acting for the applicant, this was not his contention. As a matter of fact, the trial magistrate did examine the circumstances in which PW1 and PW2 identified the applicant on 1 or 2nd April, 1986 eg, the area in that night was bright, that the meeting with the applicant was for some 15 minutes, etc.

The only failure by the trial magistrate, as contended for the applicant, was the administration of caution to herself. In this regard, the guidelines in *R v. Turnbull,* supra, stated:

> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if, in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe. (p. 554C)

In the instant case before us, it would have been prudent to hold an identification parade. However, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole, more particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting, *inter alia,* the recovery of the car-key from the applicant, the use of the car by the applicant, the removal of the car from the front of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, we see no failure of justice having occasioned nor do we see any ground for contending that the conviction is unsatisfactory or unsafe. This is not a case in which the witness's ability to make identification is in doubt. We see no reason to interfere with the trial magistrate's finding which was affirmed by the High Court. We are of the unanimous view that on the particular facts and circumstances of this case there had been no miscarriage of justice and that the concurrent findings of the trial magistrate and the High Court ought not be disturbed. We accordingly order the conviction and the 14 months imprisonment sentence do stand.

As the applicant is on bail, the bail is hereby revoked. Security deposit for the bail, if given, be returned. The applicant do forthwith serve the sentence as imposed, regard, however, to be had to the time of imprisonment that he has already served.